In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 307

ROYAL INSURANCE COMPANY, LTD.
(a corporation),
Petitioner,

vs.

ROBERT A. SMITH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

PERCY V. LONG,
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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of Royal Insurance Company, Ltd., a corporation, petitioner above named, respectfully shows:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This is an action at law upon a valued policy of fire insurance covering upon a leasehold, as follows (R. 221):

> "$15,000.00—*On assured's Leasehold Interest* in property located on the Beach Road on the westerly shore of Belvedere Cove * * *.
>
> *This insurance is predicated upon lease to land* above described held by the assured from the Trustees of the City of Belvedere, California, to which there is paid a monthly rental of three dollars ($3.00).
>
> If, by fire occurring during the term of this policy, the dwelling house owned and occupied by the assured situate on the above described land is destroyed and thus *cause the cancellation of lease* in accordance with the terms and conditions [sic], * * * in event the property cannot be *re-leased,* then the whole sum of this insurance shall be payable * * *.
>
> It is understood and agreed that there shall be no loss payable under this policy except as a result of fire of sufficient extent to cause *the cancellation of the lease.*" (Emphasis ours throughout.)

A brief consideration of the prior proceedings in the cause is essential at this point.

The prior proceedings.

The original complaint alleged that respondent's leasehold interest arose out of the provisions of the deed by which the town acquired title to the beach

property; this deed is attached to the present complaint as an exhibit (R. 17-26). The first trial resulted in judgment for respondent, which was reversed on appeal by the Circuit Court (77 Fed. (2d) 157, 159) on the ground that "no interest subsisted in plaintiff [respondent] by the terms of the deed alone", and therefore the complaint did not state a cause of action. With regard to the evidence, the Circuit Court there said (p. 158):

> "The soundness of this proposition of pleading may be tested by reference to the proof adduced at trial. No scintilla of evidence offered there gave indication of the existence of any express agreement of lease to Smith [respondent] or any of his predecessors."

Thereafter, respondent three times amended his complaint. The trial Court sustained a demurrer to the present complaint without leave to amend. Respondent appealed, and the Circuit Court (93 Fed. (2d) 143) reversed the resulting judgment. Petitioner's request for certiorari was denied (303 U. S. 656, 58 S. Ct. 759, 82 L. Ed. 1115).

A second trial resulted in judgment for petitioner (26 Fed. Supp. 238; R. 60, 93). On appeal, the Circuit Court (111 Fed. (2d) 667; R. 366-76) reversed this judgment. Petition for rehearing was denied (R. 377); and petitioner now prays certiorari.

The issues.

The second opinion of the Circuit Court (which was addressed entirely to the pleadings, there being no

evidence then before the Court), adequately summarizes the allegations of the present complaint (93 Fed. (2d) 143, 144-6):

> "Essentially, his [respondent's] third pleading *alleges* that in the year 1884 one Keil, his predecessor in interest, erected on the westerly shore of Belvedere cove certain structures known as Keil Cottage. * * * After the erection of the improvements a dispute arose between him [Keil] and the Belvedere Land Company concerning the ownership of the land. The parties composed the dispute in a *written agreement* which * * * has been *lost or destroyed.* In this instrument Keil transferred his interest in the fee to the Belvedere Land Company, and the latter in turn * * * agreed to allow him, *as its lessee,* * * * to have the exclusive possession and use of the ground *until such time as the improvements should be destroyed by fire, or otherwise.* In 1897 the Belvedere Land Company conveyed this parcel to the Town of Belvedere for use as a public beach. The town, it is alleged, *took with knowledge* of Keil's existing rights. * * * The ground rent [three dollars monthly, as allegedly specified in the said agreement] continued to be paid * * * by Keil and his successors in interest, including plaintiff, down to May, 1932, when the Keil cottage was destroyed by fire. * * *
>
> By intermediate conveyances, plaintiff in October, 1928, became the owner of all the right, title, and interest of Keil in the real property and improvements. There are *averments* * * * that there was an *understanding* between plaintiff and the town to the effect that he *would not be disturbed* in the exclusive possession of the premises and

improvements *unless the same should be totally destroyed by fire, or otherwise.* * * *

* * * The present complaint * * * *alleges* the existence of *contract rights* * * *. The *interest* disclosed in the present *pleading* is in the nature of a *leasehold.* * * * Appellant thus *pleads* not only an insurable interest * * *, but *an interest of the character described in the policy. His estate in the land was terminable on the contingency of the destruction of his buildings by fire.* * * *

* * * There is no glaring inconsistency between the *averments* of the pleading and the description in the *policy.* * * *

* * * Here, the appellant *seeks recovery on the policy as written* * * *.

* * * He is *not* asking for reformation. * * * *The appellant is entitled to an opportunity to make his proof.*"

In short, respondent's complaint alleges, as the factual basis of his claimed leasehold interest, that he was the successor in interest to the leasehold existing under Keil's "written agreement" (now "lost") with the former owner of the land entitling Keil as "lessee" of such former owner to "exclusive possession and use of the ground until such time as the improvements should be destroyed by fire, or otherwise"; and that the title acquired by the town in 1897 was taken subject to this agreement of lease. (Quotations in this paragraph are from the Circuit Court's second opinion, as quoted immediately above.)

The proof.

The record contains not a scintilla of evidence of any express agreement of lease ("lost" or not lost) to respondent, to Keil, or to anyone at all, for the term pleaded, or for any term whatever; nor of any "understanding" with the town or any of its officials that respondent "would not be disturbed" in his occupancy. It was shown only that, for some forty-five years, respondent and his predecessors occupied the improvements originally built by Keil on the beach property, from time to time made extensive additions to these improvements, and regularly paid a ground rent of three dollars monthly to Belvedere Land Company. [See, for a discussion of the evidence, the opinions of the trial Court (R. 60-3) and the Circuit Court (R. 366-74).]

The Circuit Court, after summarizing the evidence in some detail, reached this conclusion (R. 372):

> **"Here, through the monthly payment and acceptance of rent, a month-to-month tenancy existed."**

QUESTIONS PRESENTED AND REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

IS IT WITHIN THE APPROPRIATE FUNCTION OF AN APPELLATE COURT TO REVERSE A JUDGMENT ADMITTEDLY CORRECT (UNDER THE PLEADINGS, EVIDENCE, AND LAW OF THE CASE), FOR THE SOLE REASON THAT ANOTHER TRIAL MIGHT RESULT DIFFERENTLY IF THE LOSING PARTY AMENDS HIS PLEADINGS TO RELY UPON A NEW AND DIFFERENT THEORY OF RECOVERY?

The opinion of the Circuit Court fails to disclose any particular in which error was supposedly committed by the trial Court. [The only errors noted in the opinion (R. 370) occurred in the first opinion rendered by the Circuit Court itself (77 Fed. (2d) 157). These, we submit, can furnish no proper basis for the decision of reversal; more particularly since, although these changes of position by the Circuit Court might (and no doubt would) be of importance upon a new trial, they are in no sense basically involved in the decision of reversal.]

The trial Court committed no error.

That it was necessary for respondent in his complaint to allege the factual basis of his claimed leasehold interest, is elementary. In any event, he did so; **alleging** that he succeeded by purchase to an *express lease running for a term delimited by destruction of the improvements.*

Admittedly, there was **no proof** of this or any other lease for a term. *The most that the Circuit Court undertakes to spell out from the evidence is a month-to-month tenancy.*

The trial Court decided the case on the theory that respondent, to recover, must prove what he alleged. As the Circuit Court significantly says (R. 374):

> "*Understandably enough,* the case was decided below on the theory that to entitle appellant to recover he must prove an express lease for a term commensurate with the life of his structures."

Clearly, this was not only "understandable"; it was inevitably correct. As has been said by the Supreme Court many times: the proofs and the allegations must agree; a party can no more succeed upon a case proved but not alleged, than upon a case alleged but not proved; the examination of a case by the Court is confined to the issues made by the pleadings.

The issues tried have been chosen by respondent. His first complaint was held defective by the Circuit Court. He has since progressed to his fourth complaint, and admittedly has failed to prove essential allegations thereof. Although the facts proved as to the extent of respondent's "leasehold" interest were substantially the same at the last trial as they were at the first trial which occurred nearly seven years ago (R. 62), the Circuit Court has now ordered that he be given an opportunity to file a fifth complaint to conform to proof which he first made in 1933, thus necessitating a third trial and perhaps additional appellate proceedings.

It is the function of an appellate tribunal to correct error; not to create it. Inasmuch as a substantial departure in proof from the factual basis or theory of liability alleged is fatal, the Circuit Court's decision

of reversal means, in practical effect, that no possible disposition of the cause by the trial Court could have withstood an appeal.

The prejudice to petitioner is apparent. Relying upon the issues as chosen by respondent, petitioner withdrew and waived (R. 338) affirmative defenses of concealment and misrepresentation, of a mutual assumption of both contracting parties proving false, and of rescission.

Moreover, **on the merits,** the decision of the trial Court is unassailable. In his complaint respondent alleged that his leasehold interest arose by virtue of a *lease for a term expiring only on destruction of the improvements* (Par. II; R. 2-11); that *this* was the leasehold interest the parties intended to insure, and that when he applied for the insurance he "stated" to petitioner "and otherwise caused it to be fully advised of all of the matters and things set forth in paragraph II", to-wit, *that he had a lease for a term running until destruction of the improvements* (Par. III; R. 11-14). **Since, therefore, by express allegations of respondent, the parties contracted with reference to an express lease for a term, it is difficult to see how the existence of a month-to-month tenancy could justify recovery under the policy, either at law or in equity.**

We submit that, in reversing an admittedly correct judgment solely to permit the unsuccessful litigant to "mend his hold" and try again, the Circuit Court has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision.

II.

IS A MONTH-TO-MONTH TENANCY A "LEASE" OR "LEASEHOLD INTEREST" WITHIN THE MEANING OF THOSE WORDS IN A POLICY OF LEASEHOLD FIRE INSURANCE?

After deciding that the evidence showed that respondent had only a month-to-month tenancy, the Circuit Court proceeded to construe the policy contract and determine the meaning of the words "lease" and "leasehold", concluding (R. 373):

> "The definition of these terms appears to embrace, in effect, any agreement whether express or implied, which gives rise to the relationship of landlord and tenant."

This definition, presumably, would embrace a month-to-month tenancy, as well as a tenancy at will (R. 373).

To reach this conclusion the Circuit Court applied to these words "the niceties of legal reasoning and terminology", thereby indulging in a process expressly disapproved by this Honorable Court in *Aschenbrenner v. United States Fidelity & G. Co.*, 292 U. S. 80, 54 S. Ct. 590, 78 L. Ed. 1137.

The words "lease" and "leasehold" are plain terms, with a well understood meaning in ordinary, popular, daily usage. They are clear and unambiguous.

They mean that there is in existence between lessor and lessee a definite arrangement as to the **duration** *of the tenancy* **for a fixed or determinate period,** *known as the term.*

This meaning has been universally recognized by Courts and lexicographers. Even the law dictionaries

distinguish this usual and popular significance, imported by common speech, from the technical legal definition which was applied by the Circuit Court. *Indeed, it may be fairly said that the primary thought behind the use of "lease" or "leasehold" is the reference to something* **other than a tenancy from month-to-month or at will.** When the man in the street speaks of a tenancy from month-to-month or at will, he talks of "renting", not "leasing"; conversely, when he talks of a "lease" or a "leasehold interest", he definitely does *not* refer to a month-to-month tenancy.

Insurance contracts, like other contracts, are to be understood in their plain, ordinary, and popular sense, rather than according to the strict legal meaning of the words used. This rule is universal. As a canon of interpretation it is a part of the statute law of California (*California Civil Code,* Sec. 1644). It has been iterated and reiterated by this Court and by the Courts of California.

Leasehold insurance is an important and rapidly growing branch of the insurance business. In a leasehold insurance policy, the words "lease" and "leasehold" are, obviously, of primary importance. They should not be given a different meaning by the Courts than that which everyday usage has always assumed them to have. If they are to be construed to embrace whatever can be compressed within the broadest lawyer's definition that can be found in a legal dictionary, it must be because an ambiguity lurks within them which insurers have neither suspected nor observed.

The construction of these words as used in a contract of leasehold insurance is a matter of general importance which has not been but should be settled by this Court, especially since the subject is one of first impression so far as we are aware.

THIS COURT MAY NOW FINALLY DISPOSE OF THE ENTIRE CAUSE.

For all practical purposes the decision of the Circuit Court of Appeals is a final judgment; it settles all questions of law involved in respondent's right of recovery under the policy, leaving only subordinate questions of fact for decision.

This cause has been in the Courts for years. There have been two trials in the District Court, three appeals to the Circuit Court, and this is petitioner's second prayer for certiorari. Nevertheless, there was no conflict in the evidence at either trial as to the nature of respondent's alleged leasehold interest; the evidence at both trials was substantially the same in this respect. As the trial Court said (R. 62):

> "A careful examination of the exhibits and the transcript will show that the facts of this case and the evidence produced at this trial are precisely the same as they were at the termination of the first trial. Plaintiff has merely repeated the earlier testimony in more elaborate form; he has added nothing which would enable the court to discover a lost leasehold agreement."

If this writ issues as prayed, and the questions of law are determined as petitioner contends, a final judg-

ment may now be entered and no further proceedings will be necessary in any Court.

In any event, and although the Circuit Court has remanded the case for a new (third) trial, the issuance of the writ is necessary to prevent extraordinary inconvenience and embarrassment to your petitioner in the conduct of the cause, for the reasons noted.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Circuit Court to certify and send to the Supreme Court, for its review and determination, a full and complete transcript of the record and all proceedings in the case entitled and numbered as above; that the judgment of said Circuit Court be reversed by this Honorable Court; and that your petitioner have such other and further relief in the premises as may seem proper.

Dated, San Francisco, California,
July 30, 1940.

ROYAL INSURANCE COMPANY, LTD.,
Petitioner,

By PERCY V. LONG,
Attorney for Petitioner.

LONG & LEVIT,
BERT W. LEVIT,
WILLIAM H. LEVIT,
Of Counsel.

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The petition contains a statement of the case and references to the opinions below.

JURISDICTION.

Jurisdiction of this Court is invoked under Section 240 of the Judicial Code (U. S. Code, Title 28, Section 347).

The judgment of the Circuit Court of Appeals now sought to be reviewed was filed and entered May 6, 1940 (R. 375). Petition for a rehearing was seasonably filed under the applicable rules of Court, and denied on June 7, 1940 (R. 377). Issuance of mandate has been stayed to and including August 13, 1940, and until disposition of the petition (R. 377-8, and subsequent order dated July 2, 1940).

ERRORS TO BE URGED.

1. The Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in reversing a judgment admittedly correct (under the pleadings, evidence, and law of the case) and ordering a third trial in order to give the losing party a fifth opportunity to amend his complaint to allege a new and different basis of recovery.

2. The Circuit Court, in holding that a month-to-month tenancy is a lease or leasehold interest within the meaning of a policy of leasehold fire insurance, has decided an important question of general insurance law which has not been settled by this or any Court, and which should be settled by this Court; and in so holding the Circuit Court, by ignoring unquestioned principles applicable to the construction of contracts, has rendered a decision probably in conflict with applicable decisions of this Court.

ARGUMENT.

I. THE DECISION CREATES, INSTEAD OF CURING, ERROR.

In effect, the Circuit Court of Appeals has said to respondent: *You are seeking recovery on a policy of insurance covering on your leasehold interest in certain real property. In your complaint you have alleged the factual basis of the leasehold interest you claim to have had, namely, an express lease for a term running to destruction of your improvements on the property. You have failed to establish this lease or any other lease for a term; therefore, had the trial Court rendered judgment in your favor, we should have been forced to reverse the judgment, just as we did on the first appeal herein, because, as we there said* (77 Fed. (2d) 157, 159):

> *"* * * Since the insurance company has not had an opportunity to meet and defend against any other theory of liability, the cause must be sent back for retrial."*

However, the evidence does establish that you had a month-to-month tenancy, which is an insurable interest. We think that if you amend your complaint to allege this month-to-month tenancy as the factual basis of your right to recover, instead of an express lease for a term (which you did not have), you may be able to recover upon a new trial; provided, of course, that the insurance company is unable to establish any of its affirmative defenses, which it waived at the last trial. Therefore, we shall reverse the judgment against you in order to permit you to so amend your complaint and try again.

In short, the Circuit Court has ordered a reversal for the sole purpose of permitting respondent to amend his already muchly amended complaint to conform to the proof, necessitating thereby a third trial upon a new theory of recovery at variance with that chosen by respondent himself.

1. It is necessary, in a suit upon a policy of insurance, for plaintiff to allege in his complaint the factual basis of his claimed insurable interest.

M. S. Dollar S. S. Co. v. Maritime Ins. Co. (C. C., N. D. Cal.) 149 Fed. 616, 617; suit on a policy of marine insurance:

> "There is no allegation * * * in the complaint touching the nature of the interest or what it was that plaintiff had, if any, and the complaint is palpably insufficient in this particular. I deem it insufficient to allege simply that plaintiff had an interest. This is a conclusion. *The complaint should show what that interest is or the nature thereof, so that the court could see at once what claim is being made as to plaintiff's property right in the vessel. (Cits.)*"

8 *Couch, Cyc. of Insurance Law,* 6822:

> "In the case of insurance upon property, the declaration should contain an averment *of such facts* as show an insurable interest in the insured plaintiff."

2. Departure in proof from the factual basis or ground of recovery alleged is fatal, and the theory of liability urged by plaintiff upon trial may not be abandoned on appeal.

This principle is well settled; we refer to a few of the many authorities asserting and applying it.

Denver Union Stock Yard Co. v. U. S., 304 U. S. 470, 484-5, 58 S. Ct. 990, 82 L. Ed. 1469, 1481:

> "But we are not called on to decide that question. * * *
>
> The burden was on appellant [plaintiff] by direct allegations plainly to set forth the facts on which it intended at the trial to maintain that the rates are confiscatory. * * * Its complaint failed to disclose the claim it now makes. * * * As the issue was not appropriately presented below, appellant is not entitled to have it decided here."

Lesser Cotton Co. v. St. Louis etc. Ry. Co. (C. C. A. 8) 114 Fed. 133, 142:

> "It is too late for the plaintiffs, after the trial of the case upon this theory, to challenge in the appellate court the ground upon which they sought a recovery * * *."

G. W. Sheldon & Co. v. Hamburg Amer. etc. (C. C. A. 3) 28 Fed. (2d) 249, 251:

> "A libelant must recover, if at all, upon the cause of action alleged. He may not allege one cause of action and prove another. 'The allegata and probata must reciprocally meet to conform to each other.' If the law were otherwise, the respondent would never be prepared to meet the proofs in the case. Courts would be subjected to interminable delays, or causes of action would not be decided upon their merits."

This rule has been frequently recognized and applied in the Ninth Circuit.

Hartford Fire Ins. Co. v. Bonner Mercantile Co. (C. C. A. 9) 56 Fed. 378; suit by an insurance com-

pany to set aside an award of arbitrators. Judgment at trial went for defendants; plaintiff appealed, urging that the evidence established a ground of misconduct sufficient to invalidate the award, though not pleaded. The Circuit Court said (p. 382):

> "Without discussing the question whether this misconduct was sufficient to impeach the award, it is sufficient, so far as this case is concerned, to point to the fact that the complainants, in drawing their bill, did not set forth these facts as ground for setting aside the award, and, after the conclusion of the evidence, did not see fit to ask leave to amend, so as to avail themselves thereof."

Van Norden v. Lumber Co. (C. C. A. 9) 17 Fed. (2d) 568, 570:

> "In reviewing the proceeding * * *, we are limited to errors in its [the trial court's] rulings, and in an appellate court the plaintiff in error may not mend his hold and present a ground of recovery not suggested to the trial court."

Parrott Estate Co. v. McLaughlin (C. C. A. 9) 89 Fed. (2d) 188, 190:

> "It has been uniformly held that the theory upon which the case was tried in the lower court should be the theory considered on the appeal * * *."

The rule in California is the same.

Chetwood v. California Nat. Bank, 113 Cal. 414, 45 Pac. 704, 707;

Eucalyptus Growers Assn. v. Orange County N. & L. Co., 174 Cal. 330, 163 Pac. 45, 47;

Gibson Properties Co. v. City of Oakland, 12 Cal. (2d) 291, 83 Pac. (2d) 942, 946;

Sullivan v. Vera, 125 Cal. App. 303, 13 Pac. (2d) 770, 772-3.

See, also:

Union Pacific R. Co. v. Wyler, 158 U. S. 285, 290-3, 15 S. Ct. 877, 39 L. Ed. 983, 988-9;

Missouri etc. Ry. Co. v. Wulf, 226 U. S. 570, 575-7, 33 S. Ct. 135, 57 L. Ed. 355, 363;

Lehigh Valley R. Co. v. State of Russia (C. C. A. 2) 21 Fed. (2d) 396, 402-3;

Schulenberg v. Norton (C. C. A. 8) 49 Fed. (2d) 578, 579;

3 *Am. Jur.;* Appeal and Error, Secs. 253, 281, 830.

3. Amendments to conform to proof are permitted on appeal only to sustain a judgment, and not to reverse a judgment otherwise proper.

While permission to amend a complaint to conform to the proof is properly granted by an appellate tribunal when a case is *reversed for other reasons,* or when an otherwise correct decision for a plaintiff is *affirmed;* it is unique (and, we submit, a wide departure from the accepted and usual course of judicial procedure) for a Circuit Court of Appeals to reverse an otherwise correct disposition of the cause by the trial Court merely because the Circuit Court believes that another trial *might* result differently if the losing party amends his pleadings to rely upon a different basis of recovery.

Moss v. Jacobowitz (N. J.) 11 Atl. (2d) 45, 46:

"The appellants assert the right to set up complainant's acquiescence here. They have no such right. This Court may order an amendment if the amendment sought is within the issue raised by the proofs *but only to accomplish an affirmance of the judgment or decree, never a reversal. The amendment * * * could not be allowed here for the purpose of effecting a reversal. This, as a matter of law, is entirely settled.*"

Johnston v. Muskegon County (Mich.) 162 N. W. 341:

"The plaintiff, to reverse this judgment, must affirmatively show error; and, to do so, I think must show by the record, not only that he has proven, but has alleged, actionable negligence on the part of the defendant which the Court declined to submit to the jury. The fact that in making his proof, as to how the accident occurred, he gave evidence tending to show negligence other than that alleged in the declaration, does not broaden the allegations therein contained, particularly when to so broaden them would work a reversal of the case. *It must be borne in mind that the question here submitted is not whether the defendant, on the state of the record, could obtain a reversal of a judgment in favor of the plaintiff if the Court had submitted to the jury the question of negligence other than that alleged in the declaration.* The defendant *might be estopped* by the record made in the Court below from claiming here that a ruling of the trial Court, which he had there acquiesced in, was erroneous. Such is not the question submitted

to us. *Here the plaintiff is seeking a reversal because the Court failed to submit to the jury negligence not alleged in the declaration.* * * *

Counsel for the plaintiff most strenuously urges that the benefit of the statute of amendments be applied in this case. * * *

* * * This statute should be applied to save a judgment, *but not to work a reversal.* * * *

This statute has been frequently invoked in this Court to prevent mistrials, and on numerous occasions it has been held that, inasmuch as the amendment might have been made in the Court below, this Court would make the amendment here on its own motion. (Cits.) *But this is done to work an affirmance, not a reversal; to cure an error, not to create one.* (Cits.)

I think the trial Court correctly construed the declaration, and that *we should not, either upon our own motion, or at plaintiff's request, so amend the declaration as to create error and then reverse the case for such error.*"

21 *Ruling Case Law* (Pleading, Sec. 138) 589:

"As a general rule, the appellate courts have been liberal in allowing an amendment of the pleadings or in regarding the amendment as made, *to support the judgment,* where the amendment is of such a nature that it should have been allowed by the lower court on request, and substantial justice would be promoted by such procedure. *But appellate courts refuse to regard such an amendment as made, or permit an amendment to conform to the proof, for the purpose of reversing a judgment otherwise correct* * * *."

See also:

Brokaw v. Bank of Deaver (Wyo.) 261 Pac. 905, 907;

Peterson v. Lincoln County (Neb.) 138 N. W. 122;

Taylor v. Stanley Co. (Pa.) 158 Atl. 157, 159;

Trustees v. Ritch (N. Y.) 45 N. E. 876, 37 L. R. A. 305, 326;

Fitch v. Mayor, 88 N. Y. 500, 502-3;

Williams v. Hall, 6 Bosw. 674.

We direct attention to the pointed language of this Court in *Warner v. Godfrey,* 186 U. S. 365, 22 S. Ct. 852, 46 L. Ed. 1203, as set out in the following quotation from the opinion of the Supreme Court of Utah in *Grand Central Min. Co. v. Mammoth Min. Co.* (Utah) 83 Pac. 648, 685:

> "If such amendments [of a complaint to conform to proof] * * * were sanctioned, the ingenuity of counsel would not fail in pointing out, upon each succesive defeat a new avenue leading to another experiment, until the bankruptcy of the litigants would finally end the controversy. In *Warner v. Godfrey* [supra], the complainant filed his bill in equity to set aside a conveyance on the ground of actual fraud, and, being defeated, obtained leave to amend his bill, claiming the same relief, but upon the ground of constructive fraud. The trial court found that the charges of actual fraud were unfounded, and in this the appellate court of the District of Columbia concurred, but held that 'from another point of view, made clear by the testimony, though it may not be specifically

presented by the pleadings', acts constituting 'legal or constructive fraud', the plaintiff was entitled to prevail, reversed the decree dismissing the bill, and directed the lower court to permit an amendment. The bill was amended accordingly, and a decree entered in favor of the plaintiff. Then on appeal to the Court of Appeals this decree was affirmed, and thereafter an appeal taken to the Supreme Court of the United States. That court held it error to permit the amendment, and, speaking through Mr. Justice White, said: *'It would be highly inequitable to permit a litigant to press with the greatest pertinacity for years unfounded demands for specific and general relief, however much confidence he may have in such charges, necessitating large expenditures by the defendants to make a proper defense thereto, and then, after the submission of a cause, when the grounds of relief actually asserted were found to be wholly without merit, to allow averments to be made by way of amendment, constituting a new and substantive ground for relief.'* "

American Mills Co. v. Hoffman (C. C. A. 2) 275 Fed. 285, 293-4:

"It is no answer to say that the defendant was not harmed by what was done. [Trial court permitted plaintiff to amend his complaint in a substantial particular after both sides had rested.] We have no right to speculate upon that question. But it is by no means clear that he was not seriously prejudiced. In *Southwick v. First National Bank of Memphis* [84 N. Y. 420], the action alleged and the cause of action proved at the trial differed. It was said that the defendant had probably not been misled. Judge Earl, writing for

the New York Court of Appeals, referring to this, declared that it was no answer. He said:

> *'A defendant may learn outside of the complaint what he is sued for, and thus may be ready to meet plaintiff's claim upon the trial. He may even know precisely what he is sued for when the summons alone is served upon him. Yet it is his right to have a complaint, to learn from that what he is sued for, and to insist that that shall state the cause of action which he is called upon to answer, and when a plaintiff fails to establish the cause of action alleged the defendant is not to be deprived of his objection to a recovery by any assumption or upon any speculation that he has not been injured.'"*

II. A MONTH-TO-MONTH TENANCY IS NOT A "LEASE" OR "LEASEHOLD INTEREST" WITHIN THE MEANING OF THOSE TERMS AS USED IN A POLICY OF LEASEHOLD FIRE INSURANCE.

The insurance contract in suit covers the assured's **"leasehold interest"**, and is expressly **"predicated"** upon the existence of a **"lease to land"** (R. 221).

The Circuit Court of Appeals has determined from the evidence that respondent's interest in the land was a month-to-month tenancy, and has concluded that such a tenancy is "embraced" within the coverage of the policy.

1. The construction adopted by the Circuit Court.

The definition of the terms "lease" and "leasehold", says the Circuit Court (R. 373)—

> "*appears to embrace,* in effect, any agreement, whether express or implied, which gives rise to the relationship of landlord and tenant."

This would comprehend even a tenancy at will, according to the quotations found in the opinion (R. 373).

It is apparent that the opinion adopts a strictly technical legal definition, giving to these words the most expansive meaning possibly applicable to them.

Significantly, no consideration seems to have been given by the Court to whether the terms as used in the policy are ambiguous; to whether they have a plain meaning in common usage; nor to what that plain meaning, if any, is.

Petitioner does not dispute the abstract proposition that the terms "lease" and "leasehold", technically and legalistically defined, are capable of "embracing" any type of tenancy, including one from month-to-month or at will. Petitioner does contend, however, that words used in a contract (including an insurance contract), unless of doubtful meaning, are to be given that significance which common speech imports; that the words in question have acquired a plain, commonly accepted meaning in ordinary and popular usage; and that that meaning definitely does *not* embrace tenancies from month-to-month or at will.

Without exception, each of the cases quoted or cited in the opinion (R. 373-4) involved *a written agreement specifying a fixed term during which occupancy was to continue.* It is entirely accurate to say that the authorities relied on by the Circuit Court in support of

the definition adopted are not, separately or collectively, even persuasive authority that the terms "lease" and "leasehold", in normal usage, "embrace" within their meaning a month-to-month tenancy.

The first quotation (R. 373) is from *Bouvier* as quoted in *Walls v. Preston,* 25 Cal. 59. We merely note that *Bouvier's Law Dictionary* (Rawle's 3d Rev.) defines "leasehold" as follows:

> "Leasehold. The estate held by virtue of a lease. **In practice the word is generally applied to an estate for a fixed term of years.**"

The second quotation (R. 373) is from *Ruling Case Law* as quoted in *Stone v. City of Los Angeles,* 114 Cal. App. 192, 299 Pac. 838. We merely note that in the very same section quoted by the Circuit Court [16 *Ruling Case Law* (Landlord and Tenant, Sec. 2) 531] the text continues:

> "* * * **As ordinarily employed, the word 'lease' implies a term** and reversion to the owner of the land after its termination, and only a chattel interest passes. The term **'tenant'** is, however, sometimes used in a **broader sense** so as to include 'one who holds or possesses lands or tenements by any kind of title, either in fee, for life, years or **at will.**' "

2. Insurance contracts, like other contracts, are to be taken and understood in their plain, ordinary, and popular sense.

California Civil Code, Sec. 1644:

> "Words to be understood in usual sense. The words of a contract are to be understood in their ordinary and popular sense, *rather than according to their strict legal meaning* * * *."

1 *Restatement of Contracts* 319, Sec. 235 (a):

> "The *ordinary meaning* of language throughout the country is given to words unless circumstances show that a different meaning is applicable."

This has been called the golden rule of construction (3 L. R. A. 859). It applies to contracts of insurance, the terms of which are to be construed *"in their plain, ordinary, and popular sense"* (*Imperial Fire Ins. Co. v. Coos County,* infra). As in the case of other contracts, policies of insurance will be interpreted most strongly against the party who prepared them (the insurer), *but only if the language used is ambiguous or of uncertain meaning.*

Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231;

Bastian v. British American Assur. Co., 143 Cal. 287, 77 Pac. 63;

Greenberg v. Continental Casualty Co., 24 Cal. App. (2d) 506, 75 Pac. (2d) 644.

In *Aschenbrenner v. United States Fidelity & G. Co.,* 292 U. S. 80, 54 S. Ct. 590, 78 L. Ed. 1137, the Supreme Court reversed the Ninth Circuit Court of Appeals for the *identical error* in construing a policy of insurance which that Court has, we respectfully submit, repeated in the case at bar. There, the Circuit Court had construed the word "passenger" "by applying the term as it was said to be defined in the law of common carriers". The Supreme Court, holding this to be error, said (292 U. S. 84-5, 78 L. Ed. 1140-1):

> "But it is unnecessary here to follow *the niceties of legal reasoning and terminology* applied in negligence suits against common carriers, for we are interpreting a contract and are concerned only with the sense in which its words were used. * * * Unless it is obvious that the words are intended to be used in their technical connotation they will be given *the meaning that common speech imports.*"

The *Aschenbrenner* decision was in favor of the insured and against the insurer. However, the rules of construction are of general application, regardless of the result reached. (*Imperial Fire Ins. Co. v. Coos County,* supra.)

3. The correct meaning of the words "lease" and "leasehold" as used in the policy excludes a tenancy from month-to-month, because it imports a hiring for a fixed or determinate term.

> "The meaning of English words and phrases is within the judicial knowledge of the court." 20 *Am. Jur.* (Evidence, Sec. 67) 89.
>
> *Nix v. Hedden,* 149 U. S. 304, 13 S. Ct. 881, 37 L. Ed. 745.

The words "lease" and "leasehold" are common to ordinary business usage in the daily affairs of mankind, and they have acquired a fixed and definite meaning,—a generally accepted significance.

Jamaica Pond Aqueduct Corp. v. Chandler, 91 Mass. 159, 167, per Bigelow, C. J.:

> **"Undoubtedly the word 'lease', as ordinarily interpreted and understood, * * * denotes the creation of an estate for years commonly called a term."**

Mayberry v. Johnson, 15 N. J. L. 116, 121:

> "* * * **In common parlance,** where it is said a man has a *lease* for property, nothing more is meant, than that he has **a term, or an estate for years** in the premises * * *."

Levin v. Saroff, 54 Cal. App. 285, 201 Pac. 961, 962-3:

> "To create a valid *lease,* but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and boundary of the property leased; second, **a definite and agreed term;** and, third, a definite and agreed price of rental, and the time and manner of payment. These appear to be the only *essentials.*"

[To have a definite term, it is not necessary that the lease terminate on a fixed date.

Raynolds v. Hanna (C. C., N. D. Ohio, E. D.) 55 Fed. 783, 800:

> "In the present case the term (of the lease) is sufficiently definite. * * * It is to continue so long as there is coal that can be 'practicably mined'. This constitutes a *'determinate period'.*"

Compare, respondent's *alleged* tenure running until destruction of the improvements (Complaint, par. II; R. 2-11).]

Koehler v. Dennison (Ore.) 143 Pac. 649; suit to recover moneys obtained by fraud. It was alleged that the defendants falsely represented to plaintiff that, if he would pay them a stipulated sum and take possession of a certain barber shop, one of the defendants would, as soon as the sale was consummated, secure a

"lease" of the premises for plaintiff. Plaintiff paid defendants and took possession; he then applied to the owner of the premises for a lease, which was refused him. In affirming judgment for plaintiff, the Court said (p. 652):

> "Soloman accepted from Koehler the stipulated rent in advance for a month thereby entitling him to the possession of the barber shop for that time. *The parties unquestionably understood by the use of the word 'lease', as employed by plaintiff, that it meant a writing executed to him by Soloman evidencing a demise of the premises for a reasonable term.*"

Text writers, dictionaries (both lay and legal), and encyclopedias, almost without exception, recognize the common meaning of "lease" and "leasehold", and many of them expressly distinguish this common meaning from the technical legal definition used by the Circuit Court. For the convenience of the Court, we have collected a number of these definitions in an appendix to this brief. As representative thereof, we here refer to but two.

Abbott's Law Dictionary:

> "Leasehold. Any interest in land less than freehold *might* be so called; *but, in practice, the word is generally applied to an estate for a fixed term of years.*"

The Oxford Dictionary:

> "Lease. a. A contract between parties, by which the one conveys land or tenements to the other for life, for years, or at will, usually in consideration of rent or other periodical compensa-

tion. * * * *In popular language lease is usually confined to a conveyance by deed for a term of years.*"

4. The record shows that the parties intended to use the words "lease" and "leasehold" in the usual sense.

Respondent's complaint (par. II; R. 2-11) alleges that he had a lease for a term running until destruction of the improvements, and further alleges (par. III; R. 11-14) that prior to the issuance of the policy he "stated" to petitioner that such was the interest he had and desired to insure.

The uncontradicted testimony of respondent's witness Hanley, who acted for respondent in procuring the policy, is clear.

*"'Do you recall, Mr. Hanley, making a statement to me * * * on July 15, 1932?*

A. *Yes, sir, a voluntary statement.*

Q. *Do you recall that I asked you on that occasion as follows:*

"Q. *And you [Hanley for respondent, and Evans for petitioner] worked on the assumption that there was a lease between the Belvedere Land Company and Smith's [respondent's] predecessors in interest?*

A. *That is correct; * * * the company [petitioner] would not have issued the policy, or Matt Evans would not have approved of the policy unless we thought there was a lease * * *.*" * * *

Q. *That accords with your recollection, does it?*

A. *It does, yes.'*" (R. 328-9.)

"Q. *It is a fact, is it not, that the lease you and Mr. Evans were talking about was a lease*

which ran until the building was destroyed; is that not correct?

A. *That would be correct.* * * *

Q. * * * *Did you or did you not tell Mr. Evans that Mr. Smith had a lease to the property?*

A. *I told Mr. Evans that Mr. Smith had a lease to the property through his predecessors, through Bland, through Keil and to himself.* * * *

Q. *You did tell Mr. Evans, didn't you, that Mr. Smith held a tenancy of the property as long as his building remained on the property?*

A. *That is correct."* (R. 331-2.)

CONCLUSION.

Petitioner earnestly urges that the writ issue as prayed; that the decision of the Circuit Court of Appeals be reversed; and that the judgment of the trial Court be affirmed.

Dated, San Francisco, California,
August 1, 1940.

Respectfully submitted,
PERCY V. LONG,
Attorney for Petitioner.

LONG & LEVIT,
BERT W. LEVIT,
WILLIAM H. LEVIT,
Of Counsel.

(Appendix Follows.)

Appendix

DEFINITIONS OF "LEASE" AND "LEASEHOLD".

1. **Law Dictionaries.**

Abbott's Law Dictionary:

"Leasehold. Any interest in land less than freehold **might** be so called; **but, in practice, the word is generally applied to an estate for a fixed term of years.**"

Anderson's Law Dictionary:

"Leasehold. An estate in land **for a fixed term of years.**"

Bouvier's Law Dictionary (Rawle's 3d Rev.):

"Leasehold. The estate held by virtue of a lease. **In practice the word is generally applied to an estate for a fixed term of years.**"

Byrne's Law Dictionary:

"Lease. A lease is in effect a conveyance or grant of the possession of property (generally but not necessarily land or buildings) to last during the life of a person, or for a term of years or other fixed period, or at will, and usually with the reservation of a rent. Leases for a life or lives are comparatively rare, **and when a lease is spoken of, prima facie a lease for years is meant.**

Leaseholds are lands held under a lease for years."

Rapalje and Lawrence's Law Dictionary:

"Leaseholds. Lands held under a lease **for years.**"

2. English Dictionaries.

Chambers' English Dictionary:

"Lease. A contract letting a tenement **for a term of years** * * *."

Chambers' Etymological Dictionary:

"Lease. n. A loosing or letting of tenements **for a term of years;** the contract for such letting; any tenure.—v.t. To let **for a term of years.**"

Encyclopedic Dictionary:

"Lease. I. Literally: 1. A demise, conveyance, or letting of lands, tenements, or hereditaments **for a term of years,** at a certain specified rent or payments. 2. The document or deed by which lands, tenements, or hereditaments are leased. 3. The time for which lands, etc., are let under a lease. II. Fig.: Any tenure or holding; duration; time allotted."

Funk & Wagnall's New Standard Dictionary:

"Lease. 1. A contract for the possession and profits of lands **for a determinate period,** less than the time for which the lessor holds the same, in consideration of a recompense of rent.

'An estate for years * * * is one that is created by a contract, technically called a lease, whereby one man, called the lessor, lets to another, called the lessee, the possession of lands or tenements **for a term of time fixed and agreed upon** by the parties to the same.' Emory Washburn, Am. Law of Real Property, vol. i, bk. i, p. 384."

"Leasehold. An interest in lands held as a dependent tenure by virtue of a lease **for a term.**"

March's Thesaurus Dictionary:

"Lease. A contract for the possession and profits of lands, etc., **for a determinate period;** the document for this."

Murray's New English Dictionary:

"Lease. 1. A contract between parties, by which the one conveys lands or tenements to the other for life, for years, or at will, usually in consideration of rent or other periodical compensation. * * *

The grantor of a lease is called the lessor, and the grantee, the lessee. **In popular language, lease is usually confined to a conveyance by deed for a term of years.**"

The Oxford Dictionary:

"Lease. a. A contract between parties, by which the one conveys land or tenements to the other for life, for years, or at will, usually in consideration of rent or other periodical compensation. * * * **In popular language lease is usually confined to a conveyance by deed for a term of years.**"

Skeat's Etymological Dictionary:

"Lease. 1. To let tenements **for a term of years.**"

The Universal English Dictionary:

"Lease. v. t. To grant possession of lands or tenements **for a term of years** under a contract.

Lease. n. 1. Contract whereby possession of land or buildings etc. is granted by owner **for specified term of years,** usually subject to payment of rent. 2. The rights enjoyed under such a contract.

Leasehold. adj. Held on a lease; n. land etc. held on a lease **for a term of years.**"

Webster's New International Dictionary:

"Leasehold. n. A tenure by lease, or the land held; specif., land held as personalty under a lease **for years.**"

3. Encyclopedias and Texts.

35 *Corpus Juris* (Landlord and Tenant, Sec. 379) 1139:

"The word 'lease' is used in various senses. It is sometimes applied to the term or estate created, sometimes to the written evidence of the term or estate, and again to the demise or conveyance by which the tenure or estate is created. * * *

To 'lease' is to transfer, **for a term specified therein,** from the lessor to the lessee, the property therein demised; also to let; to farm out; to rent."

And, in Sec. 380, p. 1139 (n. 8), the following definitions are quoted:

"A contract by which one person * * * divests himself or itself of, and another person takes possession of, lands or chattels **for a term.**" (Citing cases.)

"A contract between lessor and lessee, vesting in the latter a right to the possession of the land

for a term of years." (Citing Tiedemann Real Prop., Sec. 538.)

Nelson's Perpetual Loose Leaf Encyclopedia:

"Leasehold. The estate of one who holds land under a lease **for years.**"

The New International Encyclopedia (2d Ed.), vol. XIII, pp. 678-9:

"Lease. The act or instrument whereby any estate in land less than a fee is created. **In its most extended sense** the term thus includes the conveyance of a life estate as well as the agreement which results in a tenancy for years, **at will,** or from year to year. **More frequently, however, it is applied to the writing (not usually a deed) or the parol declaration creating an estate for years, or leasehold, as it is technically called.**"

Pitman's Commercial Encyclopedia, vol. 3, p. 911:

"Leaseholds. Land held **for a fixed term certain, as for a definite number of years,** is known as a leasehold."

16 *Ruling Case Law* (Landlord and Tenant, Sec. 2) 531:

"* * * **As ordinarily employed, the word 'lease' implies a term** and reversion to the owner of the land after its termination, and only a chattel interest passes. The term **'tenant'** is, however, sometimes used in a **broader sense** so as to include 'one who holds or possesses lands or tenements by any kind of title, either in fee, for life, years or **at will'.**"

Schneider, California Real Estate Principles and Practices:

"Estates for years. **This** is the estate **quite generally** designated as a lease." (Ch. III, p. 15.)

"Regardless of the length of the term, the right of the tenant to use the leased premises is personal property, and his holding under a lease **for a definite or determinate term** is called a leasehold." (Ch. XXIII, p. 440.)

3 *Thompson on Real Property* (Permanent Ed.) 132, Sec. 1100:

"Definition and nature of lease. The instrument in writing creating the relation of landlord and tenant is termed a 'lease', and may be defined as a conveyance by the owner of an estate to another, of a portion of his interest therein for a term less than his own, usually in consideration of a stipulated rent to be paid by the grantee or lessee for the use and enjoyment of the premises, and passes a present interest in the land for the period specified. 'A lease doth properly signify a demise or letting of land, etc., unto another for a lesser time than he that doth let it hath in it.' 'A lease when we mean thereby the instrument, is in legal language, an indenture of lease or a deed; and therefore Bacon and Cruise, and other authors treat of leases under the running or general title of deeds. **But in common parlance, where it is said a man has a lease of property, nothing more is meant than that he has a term or estate for years in the premises, which may pass by deed or writing not under seal.** The former is of itself a lease; the latter, only written evidence of one; and this distinction will be found in sev-

eral of the cases when the question has been whether the instrument did or did not require a stamp.' A lease is a grant of an estate in land for a limited term with conditions attached. It is not infrequently referred to as a contract between lessor and lessee granting unto the latter the right to the possession of specified land **for a term of years,** which becomes an estate on the reduction of the land to possession. * * *"

In the Supreme Court
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United States

OCTOBER TERM, 1940

No. 307

ROYAL INSURANCE COMPANY, LTD.
(a corporation),
Petitioner,

vs.

ROBERT A. SMITH,
Respondent.

PETITIONER'S REPLY BRIEF.

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Respondent.

PETITIONER'S REPLY BRIEF.

I.

Respondent objects that the showing of petitioner is inadequate to justify certiorari.

A. He says (p. 2) that the points urged by us do not "fall within the letter or spirit" of Rule 38, because "the issues revolve entirely upon local or state laws".

This is not true as to the procedural question involved in the Circuit Court's *reversal* to permit re-

spondent to amend to conform to proof, which action constitutes, we submit, so wide a departure from the usual course of judicial procedure as to call for an exercise of the supervisory power of this Honorable Court. (See, our Petition and supporting Brief, Point I.)

It is true that the proper construction of the contract in suit is a question, ultimately, of "state law". *Erie R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487. But the petition and brief point out (Point II) that the decision of the Circuit Court in this connection is "probably untenable" and therefore probably in conflict with the state law as yet unannounced by any Court of the State of California.[1] And this has been recognized as an appropriate basis for certiorari. *Ruhlin v. N. Y. Life Ins. Co.,* 304 U. S. 202, 206, 58 S. Ct. 860, 82 L. Ed. 1290, 1292.[2] Moreover, our petition (p. 11) and brief (pp. 14-15) further show that the construction adopted by the Circuit Court resulted from a failure to follow applicable rules of California law laid down both by statute and by decision of the highest Court of this State.

B. Respondent intimates (p. 2) that petitioner has asked this Court to review the evidence in order to determine whether it establishes the existence of a leasehold interest in respondent.

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1. The Petition (p. 12, par. 1) asserts that "the subject is one of first impression". This is borne out by respondent's brief; the authorities cited by him (p. 9) are on other points entirely, as will be noted hereinafter. (See, infra, p. 4.)

2. This case, strangely, is the only authority cited by respondent in support of his contention that certiorari is not justified on petitioner's showing.

This is wholly incorrect. The Circuit Court decided that the evidence established that respondent was a month-to-month tenant. Neither petitioner nor respondent questions this finding.

The learned Circuit Court *then* concluded (erroneously, as petitioner contends) that a month-to-month tenancy is a "lease" and a "leasehold interest" within the meaning of those words in the policy in suit. The correctness of this conclusion is strictly a question of law, since it has not been contended that the interpreted words are ambiguous within or without their context.

C. Respondent argues (pp. 2-3) that petitioner's grievance is "in the main anticipatory", because there is as yet "no final judgment". However, respondent himself successfully nullifies this contention by asserting (p. 8) that the Circuit Court intended the case to be remanded to allow *"not a new trial"*[3] but merely a presentation of petitioner's "affirmative defenses, if any".

This, of course, strengthens the showing made for certiorari, since,

> "For all practical purposes the decision of the Circuit Court of Appeals is a final judgment; it settles all questions of law involved in respondent's right of recovery under the policy, leaving only subordinate questions of fact for decision." (Petition, p. 12.)

3. Italics are respondent's.

II.

Respondent attempts (p. 8) to brush aside the claimed error of interpretation of the terms "lease" and "leasehold" as of no moment.

No refutation is attempted of petitioner's argument that the Circuit Court's interpretation *was* in error (Petition and Brief, Point II), other than the bald citation of three cases which, according to respondent (p. 9), show that a month-to-month tenancy "under the laws of the State of California is a leasehold interest".

The cases cited by respondent are inapposite.

(a) *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 414, 43 Pac. 1115. This case involved neither a month-to-month tenancy nor a lease or leasehold. The property insured was a dwelling house, which was being purchased by the assured on contract. The policy required that the assured be the sole and unconditional owner of the property; but it also referred to a written application wherein the full nature of assured's interest and title was accurately stated. The Court most properly held that the reference in the policy to the application precluded reliance by the insurer upon any policy requirements contrary to the facts stated in the application.

(b) *Brown v. Sweet*, 95 Cal. App. 117, 123-4, 272 Pac. 614. This was a suit to recover money paid by plaintiff to defendant on a contract for the purchase of real property, which the latter failed to convey to the former. No questions of insurance or insurable interest were raised or discussed.

(c) *Schaeffer v. Anchor Mut. Fire Ins. Co.,* 133 Iowa 205, 207, 85 N. W. 985. This case holds that even a tenant at will has an insurable interest *in the building* he occupies. This proposition is self-evident. Any legally valid interest, however slight, is an insurable interest if the loss of that interest by the peril insured against would damnify the assured. But, in the case at bar, the policy did not cover on a *building;* it covered on a tenure of a particular kind, namely, on a leasehold interest. The existence of an insurable interest in a *building* does not imply the existence of an insurable interest in a specified *tenure* of the land upon which the building stands. To have an insurable interest in a *building,* one must have some interest *in the building;* to have an insurable interest in a *leasehold tenure,* one must have some interest *in a leasehold tenure.* Certainly, the *Schaeffer* case does not touch upon the question of whether a month-to-month tenancy is or is not a leasehold interest.

III.

Respondent makes no effort to refute petitioner's contention (Point I of Petition and Brief) that the decision below completely departed from the established procedural rule that amendments to conform to proof are permitted on appeal only to sustain a judgment, and not to reverse a judgment otherwise proper; that by so doing, the Circuit Court created error instead of correcting it; and that this unusual procedure calls for an exercise of the Supreme Court's power of supervision.

Respondent, surprisingly, attempts to justify the decision of reversal by criticising the Circuit Court's first opinion herein. He says (p. 3) that it is "the first and eminently appropriate function of any Court to correct *its own error*"; he speaks (p. 4) of "*the frailty or oddity of the first opinion*"; and he refers (pp. 4-5) to the latest opinion of the Circuit Court as a "*corrective* opinion" in which that Court "with commendable frankness was, at least in part, correcting *its own error*".

It is submitted that these "arguments" furnish a particularly strong and added reason why certiorari should be granted as prayed. Both petitioner and respondent admit, nay, contend! that the Circuit Court has erred in the decisions rendered in this case. What more persuasive situation could arise to justify the granting of the writ than this?

Dated, San Francisco, California,
September 12, 1940.

Respectfully submitted,
PERCY V. LONG,
Attorney for Petitioner.

LONG & LEVIT,
BERT W. LEVIT,
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In the Supreme Court

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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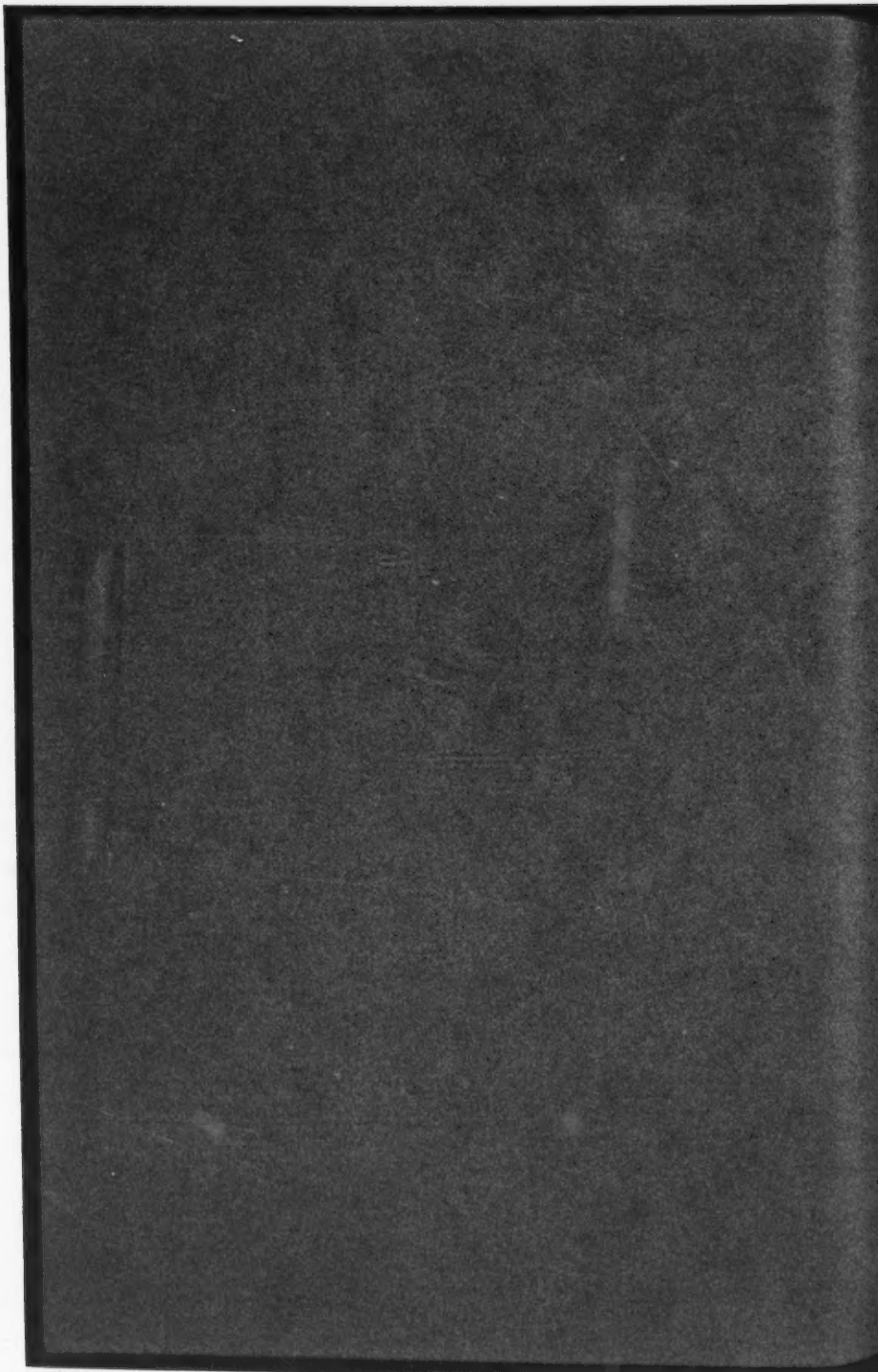

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The respondent in opposition to the granting of the petition for writ of certiorari respectfully shows that the case made warrants the invocation of the jurisdiction of this Court *neither* under Sec. 240 of the Judicial Code *nor* Sec. 5 of Rule 38 of this Court.

A reading of the questioned decision will without the citation of authorities, other than therein referred to, confirm the conclusion not only that it is well sup-

ported by those authorities but that it is sound in principle and accomplishes substantial justice.

Neither of the points urged by petitioner fall within the letter or spirit of Subs. (a), (b) or (c) of Sec. 5 of Rule 38 of the U. S. Supreme Court.

There are no constitutional or questions of Federal law, important or otherwise, involved; nor does the petition point any question which should be settled by this Court; nor does the decision cover Federal questions which are in any way or at all likely to conflict with applicable decisions of this or any Court. The issues revolve entirely upon local or state laws. And the cause grows out of a California contract.

Upon a question controlled by state or local law, even actual or probable conflict among the Circuits (and none is pointed) is not of itself a reason for granting the writ. Nor should this Court be asked merely to review the evidence or inferences drawn from it in connection with the second point made—i. e., as to whether the evidence spells the relation of landlord and tenant or lessee and lessor.

Ruhlin v. N. Y. Life Ins. Co., 58 S. Ct. 860, 304 U. S. 202, 82 Law. Ed. 1290.

I.

PETITIONER'S GRIEVANCE IS ANTICIPATORY.

A careful reading of the petition impels the conclusion that the petitioner has yet suffered no prejudice—that his grievance is in the main anticipatory. There

is yet no final judgment. The allegedly *errant* opinion holds that the respondent had an insurable interest and that the policy upon which the complaint is bottomed insured *that* interest—then remands the cause for new trial to insure the petitioner an "opportunity to prove such affirmative defenses as may be available to it." By analogy to Supreme Court appellate procedure, the petition should be denied.

Slaker v. O'Connor, 49 S. Ct. 158, 278 U. S. 188, 73 Law. Ed. 258.

II.

THE DECISION IS NOT CONTRARY TO LAW.

The petition urges two points or "reasons" for the allowance of the writ.

A. The first of these is that it is not within

> "* * * the appropriate function of an Appellate Court to reverse a judgment *admittedly correct* (under the pleadings, evidence and law of the case) for the *sole reason* that another trial might result differently if the losing party amends his pleadings to rely upon *a new and different theory* of recovery." (Italics ours throughout.)

1. It would seem to be the *first and eminently* "appropriate function" of any Court to correct its own error—particularly where such error may have resulted in confusing both the plaintiff and the trial Court.

The first opinion herein (77 Fed. (2d) 157) held that your respondent, under his pleadings and the

evidence addressable to it, was no more than a bare licensee—without, of course, any insurance interest. It required him *not to plead a new cause of action*—for the cause of action remained but one on a contract of insurance[1]—but to set forth the nature of his insurable interest or tenure.

The burden of that holding was not that the insured had failed to prove an insurable interest but that he had failed to allege it. Hence the language (77 Fed. (2d) 159):

> "However, since the insurance company has not had an opportunity to meet and defend against any other theory of liability, the cause must be sent back for retrial. The demurrer to the complaint should have been sustained with leave to the plaintiff to amend * * *".

Your respondent accordingly set forth by amended complaint a narrative of the whole transaction. And, if he was guilty of overalleging, it is now patent *not only* that petitioner was not injured, *but* that the confusion, if any, was entirely attributable to the frailty or oddity of the first opinion.

For, note that the corrective opinion now under attack states:

> "* * * The question here concerns the nature of their tenure—whether it was a leasehold interest or a mere license.
>
> As bearing on the question whether these people were tenants or licensees of the owner the deed of

1. "However, appellant has but one cause of action. He is suing on one policy of insurance not on several policies, and he is not asking for reformation. His reliance upon estoppel is incidental only." *Smith v. Royal Ins. Co.*, 93 Fed. (2d) 143 at 146.

> 1897 proves nothing, either one way or the other. *Despite expressions to the contrary in our first opinion* (77 Fed. (2d) 157), the quoted language of the deed is entirely consistent with the existence of a tenancy. And we are constrained *to disapprove, also,* as not accurately reflecting the applicable law, the Court's intimation there concerning the necessity of appellant's proving an express lease. * * *" (Tr. 370.)

> "Appellant's tenure was terminable upon the happening of the contingency insured against, and the contingency occurred. *Understandably enough,* the case was decided below on the theory that to entitle appellant to recover he must prove an express lease for a term commensurate with the life of his structures. The insurance contract does not so provide; *and such is not the law of the case."* (Tr. 374.)

This language is a clear answer to the first point made by petitioner and The Circuit Court with commendable frankness was, at least in part, correcting its own error—and this frank confession comes perilously close to being an admission that the judgment initially obtained by your respondent should have been affirmed.

2. The trial Court's judgment was not correct under *either* the evidence, the pleadings *or* the law of the case.

(a) **As to the evidence,** the Circuit Court opinion holds that respondent proved the insurable interest described in the policy—and that the trial Court obviously erred in concluding "that plaintiff had no in-

terest in real property" (Tr. 89) and "no insurable interest in the property described in said policy" (Tr. 92) *in defiance of its own factual findings* (Tr. 79-86) that respondent and his predecessors for nearly a half a century used and occupied the land against the world and to the exclusion of the owners and with their consent and acquiescence, and paid monthly rents therefor continuously and without default.

(b) **The law of the case** petitioner claims required proof of an express lease ending with the destruction of the improvements. The trial Court erred in following counsel's suggestion. Certainly the Circuit Court is itself the best judge of the law of the case, which it makes. If there was any ambiguity that Court in its decision now under fire cures it—for note its language (Tr. 370):

> "* * * And we are constrained to disprove, also, as not accurately reflecting the applicable law, the Court's intimation there concerning the necessity of Appellant's proving an express lease * * * (and Tr. 374) for a term commensurate with the life of his structures. The insurance contract does not so provide; *and such is not the law of the case.*"
>
> "Significantly the policy fails to describe the leasehold as one for a fixed term such as would normally have appeared had the interest insured been evidenced by an express contract. Hence, to bring himself within the provisions of the policy Appellant need establish no more than an insurable interest in the nature of a leasehold. This he did. It was not essential that he go further and prove the existence of a tenancy for a term run-

> ning at all events until the destruction of his buildings."

(c) **The pleading** was always one upon a contract of insurance—the gravamen, *ex contractu*—the bare necessities of which ordinarily require the allegations of (a) a policy in full force and effect; (b) the happening of the contingency insured against; and (c) the existence of an insurable interest in the subject matter of the policy. The only question raised is as to the latter,—and as to that the trial Court erred not only in requiring the *over allegation* but in holding that only the outright proof of an express lease for a term commensurate with the life of the structures would satisfy the case. Again the complete answer is that the opinion now complained of not only corrects the error, but points the culpability when it states that (Tr. 374):

> "Understandably enough the case was decided below on the theory that to entitle Appellant to recover he must prove an express lease for a term commensurate with the life of his structures."

The conclusion is irrefutable, *then,* that petitioner's argument that "the decision creates, instead of correcting, error" is specious—for the most that may be said in that regard is that the Circuit Court was correcting its own error, if any—which it had not only the right, but the duty, to do.

And there is here no quarrel with the proposition that one may not allege one cause of action and prove another. But the cause of action, as heretofore dem-

onstrated, is and always was one upon a policy of insurance. The factual basis of the insurable interest does not alter the cause of action—here the insurable interest was *that* described in the policy—let us call it "X"—and a pleading is not fatally defective because it alleges the existence of insurable interest "X" and in addition "Y" and "Z".

Nor are we cited to any cases which, under circumstances similar to those involved herein, find any impropriety in the following direction (Tr. 374) of the Circuit Court:

> "Appellant may amend his pleading in conformity with his proof and Appellee may amend its answer if it so desires. On another trial Appellee will have the opportunity of proving such affirmative defenses as may be available to it."

That Court obviously felt that since petitioner may have been prejudiced or misled (as to which there is grave doubt) by the prior decision it should be remanded to the end and purpose of allowing *not a new trial* but a presentation of his affirmative defenses, if any. The authorities cited by counsel (pp. 7-12 his brief) do not even squint at a situation similar to that involved or presented by the present case.

B. **The second point** urged by petitioner is to the effect that a month-to-month tenancy is not a "lease" or "leasehold interest" within the meaning of fire insurance policies. This is hardly of sufficient moment, as we have already urged, to warrant any action on the part of this Court, but moreover, we know of no law which prevents an insurance company from writ-

ing a valued policy of fire insurance on any type of tenure or tenancy.

The contract was secured upon a tenure which had existed continuously and unchanged since 1884 (R. 79). And at the time of the occurrence of the fire, May 17, 1932, the tenure remained unchanged and the respondent had actually paid his rent to and including October 30, 1932. The owner had been accepting and the respondent paying his rent by the year in advance (Tr. 136). The land owner or lord never questioned the tenure. It is a stranger thereto who questions it.

In fact, no authorities other than those cited in the opinion are necessary to show that the tenure in question under the laws of the State of California, if not universally, is a leasehold interest—an insurable interest (*Davis v. Phoenix Ins. Co.*, 111 Cal. 409 at 414) —"for an estate in the land is a time in the land or land for a time" (*Brown v. Sweet*, 95 Cal. App. 117 at 123-4—and see *Schaeffer v. Anchor Mut. Fire Ins. Co.*, 133 Iowa 205 at 207, 88 N. W. 985.)

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition should be denied.

Dated, San Francisco, California,
September 4, 1940.

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